

16. Procedures: Specific Aspects

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Introduction

16.1 This chapter addresses particular procedural issues that afford protection to the interests of individuals participating in an inquiry, as well as the protection afforded to confidential or sensitive information.¹ These safeguards include: the provision of information and assistance concerning the procedures adopted by an inquiry; restrictions on public access to hearings, evidence and reports; ensuring that procedures are culturally appropriate, in the context of inquiries affecting Indigenous witnesses; and mechanisms to correct the public record in relation to subsequent investigations.

Information about procedures

16.2 Providing guidance for participants in judicial and non-judicial proceedings has become increasingly common in Australia. For example, the New South Wales Independent Commission Against Corruption (ICAC) provides a brochure for witnesses and others which covers: the nature of ICAC; the nature and legal effect of a summons; their entitlements to legal representation and expenses; the conduct and

¹ See Chs 13, 17 and 18 for a discussion of different types of confidential or sensitive information. Ch 15 addressed general issues relating to the procedures adopted by inquiries.

procedure of examinations and hearings; the recording of examinations and hearings; processes after an examination or hearing; and the protection of witnesses.²

16.3 Royal Commissions customarily provide directions and rulings for the conduct of its proceedings at the beginning of, and sometimes during, an inquiry.³ These typically cover the grant of leave to appear (discussed in Chapter 15) as well as procedures for the conduct of its proceedings.

16.4 As the Council on Tribunals in the United Kingdom (UK) has observed:

It is very desirable that there should be a preliminary public hearing at which the inquiry's intended procedural ground rules can be announced, explained, discussed with the major interested parties or their representatives and determined, and the need for flexibility emphasised. Consideration should be given to inviting to such a preliminary hearing all those who are expected to be called as principal witnesses, or their representatives.⁴

16.5 The Royal Commission on Tribunals of Inquiry (1966) in the UK similarly emphasised the importance of a tribunal explaining, at the outset of an inquiry, how it proposed to interpret the terms of reference of the inquiry and the procedures it proposed to adopt.⁵ A failure to provide sufficient information could be subject to judicial review, as a breach of procedural fairness.⁶ In *Haughey v Moriarty*, the Irish Supreme Court declared that a tribunal of inquiry was obliged to explain to the plaintiffs in that case its interpretation of the terms of reference, in so far as it related to the plaintiffs.⁷

16.6 In a submission to this Inquiry, the Community and Public Sector Union (CPSU) raised the issue of the availability of procedural information about an inquiry, stating:

There is often uncertainty about what the proceedings involve and how an individual's interests may be affected by those proceedings. This has impeded individual's abilities to make informed decisions about their best representation.

For example, members who have been involved in previous inquiries have advised us whilst they were offered their own representation they did not elect to take up that option because they did not understand what would be involved in the proceedings and if they were offered the choice again they would probably make a different decision. Royal Commissions, and other forms of public inquiries, involve formal, legal proceedings, with which most APS employees would have had no previous involvement.

2 Independent Commission Against Corruption, *Information for Witnesses*.

3 Practice notes have also been issued in non-statutory inquiries, such as the Clarke Inquiry into the Case of Dr Mohamed Haneef (2008).

4 Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [7.2].

5 C Salmon, *Report of the Royal Commission on Tribunals of Inquiry* (1966), 31, 36, Rec 34.

6 Procedural fairness is discussed in Ch 15.

7 *Haughey v Moriarty* [1998] IESC 17.

Employees involved in these proceedings should be provided with very clear information about what is likely to be involved in these proceedings, including the scope of the proceedings, and any potential consequences for them as individual employees, if the report makes adverse findings against them as individuals. Such information could be provided centrally and should assist employees in making appropriate decisions.⁸

16.7 The CPSU noted that in the Quarantine and Biosecurity Review (2008),⁹ the transcript of the hearings was not made available to the CPSU or CPSU members. Also, there was no publicly available information about who had appeared, and was scheduled to appear, before the inquiry and what evidence they had put forward. The CPSU submitted that ‘this resulted in uncertainty about the focus of the inquiry, and concern about the weight being given to the evidence of the six CPSU members who appeared’.¹⁰

16.8 In contrast, the CPSU reported that, prior to the Inquiry into the Circumstances of the Vivian Alvarez Matter (2005),¹¹ which was undertaken by Neil Comrie under the authority of the Commonwealth Ombudsman (the Comrie Inquiry), the CPSU had met with the Commonwealth Ombudsman to discuss the procedures of that inquiry and the protections available to its members. This allowed the CPSU to advise its members about their rights and what they should expect during the inquiry.

16.9 The matters addressed at the meeting between the Commonwealth Ombudsman and CPSU officials related in part to: the nature of the inquiry, such as the Commonwealth Ombudsman’s use of its coercive powers; the formality of proceedings; and the Commonwealth Ombudsman’s focus on systemic issues. The meeting also addressed the rights of those participating in the inquiry to administrative support and advice, interview transcripts, and assistance in the form of a support person. Those participating could also contact the Commonwealth Ombudsman’s office after an interview to clarify matters, and were given the opportunity to respond to comments directly or indirectly critical to them.¹²

ALRC’s view

16.10 Providing sufficient information on the nature and conduct of an inquiry has a number of important benefits. For participants, it enables them to understand the purpose of the inquiry and to prepare for it appropriately. It also may serve to reduce

8 Community and Public Sector Union, *Submission RC 10*, 22 May 2009.

9 This was an independent review established by a minister into Australia’s quarantine and biosecurity arrangements, including the functions of the Australian Quarantine and Inspection Service and Biosecurity Australia. It was undertaken by an independent panel of experts chaired by Mr Roger Beale AO, a Senior Associate with the Allen Consulting Group.

10 Community and Public Sector Union, *Submission RC 10*, 22 May 2009.

11 Commonwealth Ombudsman and N Comrie, *Inquiry into the Circumstances of the Vivian Alvarez Matter*, Report 3/2005 (2005).

12 Community and Public Sector Union, *DIMA Bulletin* (April 2006). The issue of responses to such comments is discussed in Chapter 15.

their anxieties. This is likely to facilitate the efficient and effective conduct of inquiries. Further, the provision of information by an inquiry encourages inquiries to consider the impact of their work on interested parties, and encourages the early development of procedural strategies.

16.11 This information may be provided in a number of ways. For example, inquiry members may meet directly with representative organisations to discuss issues. Further, information may be provided through: directions and rulings; the production of brochures or the creation of a telephone hotline; and oral communication with interested parties.

16.12 In the ALRC's view, it is desirable that timely and sufficient information about the nature and conduct of an inquiry is available to participants. Generally, it would be appropriate for an inquiry seeking public input to issue practice notes or explain its procedures at a preliminary public meeting.

16.13 The diversity of inquiries and the variety of approaches by which such information may be supplied, however, make it undesirable to prescribe either when or how such information should be provided. For example, there is likely to be a gap between the establishment of an inquiry and the determination of procedural matters, and an inquiry may need to change its procedures during the course of its investigation.

16.14 A number of recommendations in this Report address the right of inquiry participants to information about the nature and conduct of an inquiry. For example, the ALRC recommends that the *Inquiries Act* should set out the powers available to Royal Commissions and Official Inquiries, and the exemptions from disclosure that will apply to those powers.¹³ The ALRC also recommends that the protections available to inquiry participants should be set out in the statute.¹⁴ This should assist inquiry participants in ascertaining their rights.

16.15 Other recommendations may help inquiry participants to understand when certain powers may be exercised by an inquiry. For example, the ALRC recommends that the *Inquiries Act* should list factors relevant to the decision to authorise a person to appear and, as discussed below, grounds for the exercise of the power to prohibit or restrict public access to hearings, or the publication of information relating to the inquiry.¹⁵

16.16 The ALRC also recommends (see below) that an *Inquiries Handbook* should be published to provide guidance on a number of issues including what kinds of procedures are available to inquiries, and when and how different procedures should be

13 Recommendation 5-2, Chs 11, 17, 18.

14 Recommendation 12-2.

15 Recommendations 15-2, 16-1.

used.¹⁶ This should provide inquiry participants with information about the types of procedures an inquiry might employ.

16.17 The ALRC also recommends in this Report that certain rights should be conferred on inquiry participants, such as an entitlement to expenses and a right to request publication of responses to potential adverse findings.¹⁷ There are also recommendations for the *Inquiries Act* to confer certain discretions—such as the power of the Attorney-General to grant funding for legal representation—to protect the interests of inquiry participants.¹⁸ It is desirable that information about these rights and discretions should be provided to inquiry participants, and the manner in which such information may be provided also should be addressed in the *Inquiries Handbook*.

Public access to inquiries

16.18 An issue of major importance in the protection of individual interests is the degree of public (and media) access to the inquiry, including access to hearings and evidence. This issue is also raised where the information sought by a Royal Commission or Official Inquiry may be confidential or sensitive in nature, such as where it may prejudice national security.¹⁹

Public interest in public access

16.19 Royal Commissions are largely conducted in public, in that: the hearings usually are held in public; most if not all of the evidence is published; and most if not all of the report is made publicly available.²⁰

16.20 There are strong reasons for conducting Royal Commissions (and, if established, Official Inquiries) in public wherever possible. Royal Commissions are often established to investigate a matter of substantial public interest or concern. Ascertaining the ‘truth’ of a matter and making these findings public is the fundamental reason for establishing a Royal Commission. Public exposure of wrongdoing, or publicly dispelling allegations, may be the most important outcome of a Royal Commission.²¹ Where the allegations concern the propriety of government conduct, the case for full public access may be particularly compelling.

16 Recommendation 15–5.

17 Recommendations 9–2, 9–3, 15–3.

18 Recommendations 9–1.

19 National security information is discussed in Ch 13. Chs 17 and 18 discuss other types of confidential or sensitive information which may enable a person to resist disclosure.

20 Not all Royal Commissions are conducted primarily in public. For example, the Royal Commission on Intelligence and Security (1977) conducted most of its hearings in private.

21 F Costigan, *Final Report of the Royal Commission on the Activities of the Federated Ship Painters and Dockers Union* (1984), vol 2, [14.044]; R Scott, ‘Procedures at Inquiries—the Duty to be Fair’ (1995) 111 *Law Quarterly Review* 596, 615.

16.21 Further, conducting inquiries in public helps to instil confidence in the integrity and independence of inquiry processes. It also enables citizens to access information that may be of significant public importance.

16.22 Mason J (as he then was) described the difficulties presented by holding an inquiry in private in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation*.

It shrouds the proceedings with a cloak of secrecy, denying to them the public character which to my mind is an essential element in public acceptance of an inquiry of this kind and of its report. An atmosphere of secrecy readily breeds the suspicion that the inquiry is unfair or oppressive ...

The denial of public proceedings immediately brings in its train other detriments. Potential witnesses and others having relevant documents and information in their possession, lacking knowledge of the course of proceedings, are less likely to come forward. And the public, kept in ignorance of developments which it has a legitimate interest in knowing, is left to speculate on the course of events.²²

16.23 On the other hand, there may be good reasons for restricting public access to inquiries in some circumstances. While opinions differ widely about the merits of holding public or private hearings,²³ there are readily identifiable factors that weigh in favour of private hearings.

Interests of witnesses

16.24 Inquiries, particularly Royal Commissions, can have an intrusive impact on the lives of witnesses. The reputation of a witness can be damaged even if he or she is subsequently cleared in the inquiry's final report. The mere fact of being called as a witness to a Royal Commission may damage that person's reputation, even where that person is not the principal subject of an inquiry.²⁴

16.25 These concerns about reputation are greater in the context of inquiries than in judicial proceedings, since inquiries are investigatory by nature. As Lord Justice Scott wrote in an article concerning an inquiry he had conducted:

Unless a witness is known to have relevant evidence to give, there can be no reason for exposing the witness to a public hearing ... it is worth asking on what basis an

22 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 97. See also the similar comments in the C Salmon, *Report of the Royal Commission on Tribunals of Inquiry* (1966), 20.

23 See the recent debate in the United Kingdom: House of Commons Public Administration Select Committee (UK), *Government by Inquiry*, First Report of Session 2004–05 (2005), [89]–[98]; *Persey v Secretary of State for Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin), [23]–[29], [71]–[76]; *Howard v Secretary of State for Health* [2002] EWHC 396 (Admin), [71]–[74], [78]–[82].

24 See Peter Doody, 'Commissions of Inquiry, Fairness, and Reasonable Apprehension of Bias: Protecting Unnecessary and Inappropriate Damage to Reputation' (2009) *Canadian Journal of Administrative Law & Practice* 19.

investigative hearing ought to be a public hearing. The police are not expected to conduct their investigations in public.²⁵

16.26 These concerns may be magnified in the contemporary media landscape, where ‘sound bites’ of untested allegations or opening statements turned into headlines may mislead viewers and can be transmitted instantly and globally.

16.27 Other kinds of harm to the individual interests of witnesses may result. Most seriously, the physical safety of a witness may be compromised.²⁶ For example, a person may be required to disclose personal or sensitive information that may infringe a person’s privacy.

16.28 As was pointed out in *Independent Commission Against Corruption v Chaffey*, however, an inquiry is not obliged to avoid or minimise publicity in order to protect a person’s reputation.²⁷ Rather, an inquiry must balance the public interests served by an inquiry against the interests of affected individuals.

Sensitive information

16.29 Chapters 13, 17 and 18 discuss the types of information that may be exempted from disclosure because of their sensitive or confidential nature, such as information obtained for the purposes of legal advice or information that may prejudice national security.

16.30 There are many types of sensitive or confidential information other than those that may be exempted from disclosure. For example, s 6D(2) of the *Royal Commissions Act*, which allows a person to request that financial information be taken in private, recognises the sensitivity of financial and commercial information. As discussed below, certain information also may be culturally sensitive.

16.31 Chapters 13, 17 and 18 also discuss different types of confidential or sensitive information. For the reasons discussed in detail in those chapters, some of these types of information do not justify an exemption from disclosure, but a restriction on public access may be warranted.²⁸ For example, it may be appropriate for an inquiry to receive in closed session information that would otherwise be subject to secrecy provisions or claims of privilege.²⁹

25 R Scott, ‘Procedures at Inquiries—the Duty to be Fair’ (1995) 111 *Law Quarterly Review* 596, 614.

26 This may engage the state’s duty to protect a person’s right to life, as set out in art 2 of the *European Convention on the Protection of Human Rights and Fundamental Freedoms*, which reflects art 6 of the *International Covenant on Civil and Political Rights: Officer L, Re Application for Judicial Review* [2006] NIQB 75; *R (A) v Lord Saville of Newdigate* (2001) EWCA Civ 2048.

27 *Independent Commission Against Corruption v Chaffey* (1993) 30 NSWLR 21, 28.

28 These include: national security information; information otherwise subject to confidential professional relationships privilege, religious confessions privilege, or a privilege for evidence relating to settlement negotiations; information relating to secret processes of manufacture; and information otherwise subject to a secrecy provision.

29 See, eg, *Churche v Australian Prudential Regulation Authority (No 3)* [2006] FCA 1168, [12].

Prejudice to legal proceedings

16.32 The disclosure of information may also prejudice legal proceedings that are being conducted at the same time as an inquiry, or are contemplated. As discussed in Chapter 18, at common law, an inquiry is unable to require a person to answer questions that are directly relevant to matters that are the subject of a criminal proceeding or a proceeding for the imposition of a penalty that is being conducted at the same time. The ALRC recommends that a provision setting out this limitation should be included in the proposed *Inquiries Act*.³⁰

16.33 An inquiry, however, may be able to look into matters that are otherwise relevant to legal proceedings. For example, an inquiry examining alleged malpractice in a particular industry may continue to conduct its inquiry even though the matter ‘touched and concerned a pending criminal charge’.³¹ In such a case, it may need to restrict public access to the hearings, evidence or report to ensure that it does not prejudice the related legal proceeding.³²

16.34 An inquiry also may need to restrict public access to ensure it does not prejudice any subsequent legal proceedings that may be contemplated.³³ For example, if it is contemplated that a person may be prosecuted for matters that are the subject of the inquiry, it may be necessary to hear that evidence in private to avoid the publicity influencing potential jurors. Whether it is in fact necessary will depend on the circumstances of the case—and in particular the extent of attention the inquiry hearings are attracting from the media.

Efficient and effective conduct

16.35 Another important reason for restricting public access is to facilitate a more informal and inquisitorial process. This may have several benefits. Informal and confidential meetings may be more productive in terms of ascertaining the truth, because witnesses are more likely to be frank. For example, one inquiry member gave evidence that ‘in the absence of friends, colleagues, parents, press and other embarrassments, witnesses gradually began to speak with a frankness which was at times startling’.³⁴

16.36 Public hearings often involve lawyers, which adds to the formality and cost of proceedings and tends to encourage an adversarial approach. In the view of Sir Liam Donaldson,

30 Recommendation 17–1(b).

31 *Hammond v Commonwealth* (1982) 152 CLR 188, 199.

32 *Ibid.*

33 See Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [326].

34 House of Commons Public Administration Select Committee (UK), *Government by Inquiry*, First Report of Session 2004–05 (2005), [89] citing Sir Cecil Clothier. See also *Persey v Secretary of State for Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin), [15].

the bottom line is that a public inquiry will cost you £20 million and a private inquiry will cost you £3 million, and then six months as compared to two and a half to three years.³⁵

16.37 Further, there is additional administration involved in organising public hearings and the publication of evidence. Matters such as finding appropriate venues, producing transcripts of evidence, and accommodating the public and the media inevitably require additional time and expense.

Methods of restricting public access

16.38 There are three important methods of restricting public and media access. First, information may be provided to an inquiry privately. Alternatively, if information is provided in a public hearing, some members of the public or media may be excluded.

16.39 It is clear that Royal Commissions have the power to take evidence in private. Under s 6D(2) of the *Royal Commissions Act*, witnesses may request that their evidence be given in private if they are giving evidence about the profits or financial position of any person, and the taking of that evidence in public would be unfairly prejudicial to that person. Section 6D(5) states that this provision operates in ‘aid of and not as in derogation of the Commission’s general powers to order that any evidence may be taken in private’. The Act otherwise gives no guidance on whether hearings should be held in public or private. The decision to hold an inquiry in private, however, could be judicially reviewed.³⁶

16.40 Secondly, the publication of certain evidence can be prohibited or restricted. Under s 6D(3) of the *Royal Commissions Act*, the Commission may prohibit or restrict the publication of any evidence before it, the contents of any document, a description of anything produced to a Commission, or any information that might enable a person who has given evidence before the Commission to be identified.³⁷

16.41 Thirdly, an inquiry can exercise its discretion as to what evidence or findings are made public, in a report or otherwise. For example, in the Royal Commission into the Building and Construction Industry (2003) (Building Royal Commission),

35 House of Commons Public Administration Select Committee (UK), *Government by Inquiry*, First Report of Session 2004–05, [95]. Sir Liam Donaldson was speaking as Chief Medical Officer. He was giving evidence because his department was responsible for a large number of inquiries.

36 In the UK, the decision to hold an inquiry in private has been successfully challenged as irrational: *R (Wagstaff) v Secretary of State for Health* [2000] EWHC 634 (Admin), although this has been questioned and distinguished in subsequent cases: *Persey v Secretary of State for Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin); *Howard v Secretary of State for Health* [2002] EWHC 396 (Admin). According to the jurisprudence of the European Court of Human Rights, inquiries concerning the death of people also must meet procedural obligations that flow from the right to life under art 2 of the *European Convention on the Protection of Human Rights and Fundamental Freedoms*, which reflects art 6 of the *International Covenant on Civil and Political Rights*: see M Requa, ‘Truth, Transition and the Inquiries Act 2005’ (2007) 4 *European Human Rights Law Review* 404.

37 Failure to comply with such a direction is a criminal offence: see Ch 19.

Commissioner Cole submitted a confidential volume of his report to the government,³⁸ which concerned his ‘views in relation to matters that might have constituted breaches of the criminal law’.³⁹

16.42 This discretion extends to the decision of the inquiry to publish material on the internet. In recent times, the practice has been to establish inquiry websites on which evidence, submissions and reports may be published. The Victorian Bushfires Royal Commission—which was still proceeding at the time of writing in October 2009—streamed its public hearings over the internet. This has the advantage of increasing the accessibility, transparency and accountability of inquiries. As discussed in Chapter 12, care needs to be taken with electronic publications because of the degree of accessibility and the difficulty of enforcing rules governing information (such as rules relating to privacy) in the electronic environment. The ALRC recommends, in Chapter 12, that the *Inquiries Handbook* should include guidance on the appropriateness of electronic publication.⁴⁰

Presumption of public access to hearings

16.43 The relevant legislation in some jurisdictions requires that the hearings of an inquiry should be public, subject to exceptions.⁴¹ One is s 18(1) of the *Inquiries Act 2005* (UK), which states that, subject to any restrictions imposed by the chair of an inquiry, or the responsible minister, reasonable steps must be taken to allow members of the public to attend inquiry hearings and view evidence.⁴²

16.44 The New Zealand Law Commission (NZLC), after considering this issue in its report, *A New Inquiries Act* (2008), concluded that such a provision could encourage the inappropriate use of formal hearings. The NZLC stated:

While inquiries should be as open as possible, there will be cases where their purposes are better served without formal hearings and where witnesses can speak freely without fear of public exposure.⁴³

38 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 23.

39 *Ibid*, vol 2, [59]. As noted there, other Royal Commissions have taken similar approaches to findings in relation to criminal conduct.

40 Recommendation 12–3.

41 Other examples include the *Special Commissions of Inquiry Act 1983* (NSW) s 7; *Commissions of Inquiry Act 1950* (Qld) s 16A; *Commissions of Inquiry Act 1995* (Tas) s 13; *Royal Commissions Act 1991* (ACT) s 28; *Inquiries Act 1991* (ACT) s 21.

42 Restrictions on public access may be imposed where it is in the public interest, with particular regard to the risk of harm or damage that could be avoided or reduced; any conditions as to confidentiality by which a person acquired information; and the effect on the efficiency or effectiveness of, or additional cost to, the inquiry: *Inquiries Act 2005* (UK) s 19(3), (4).

43 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [6.3].

16.45 The NZLC recommended instead that legislation should confer a specific power to hold an inquiry or any part of it in private, or otherwise restrict public access to an inquiry or any part of it.⁴⁴ It also recommended that, before making any such order, the inquiry should consider the following criteria:

- (a) the risk to public confidence in the proceedings of the inquiry;
- (b) the need for the inquiry to properly ascertain the facts;
- (c) the extent to which public proceedings may prejudice the security or defence or economic interests of New Zealand;
- (d) the privacy interests of any individual; and
- (e) whether such an order would interfere with the administration of justice, including the right to a fair trial.⁴⁵

16.46 It is useful to consider also the experience of ICAC in this respect. The *Independent Commission Against Corruption Act 1988* (NSW) originally provided that ICAC hearings generally should be held in public.⁴⁶ Concerns were expressed, however, that the publicity of the process caused ‘great and irreparable harm to entirely innocent people’.⁴⁷ In 1991, the section was amended to allow ICAC to decide whether it would hold hearings in public or private.⁴⁸ Subsequent practice has been for ICAC to make greater use of private hearings and other information-gathering powers.⁴⁹

16.47 In 2002, the Parliamentary Joint Committee which supervises ICAC recommended that all initial investigations, including hearings, should be conducted in private, followed by a public hearing if there is sufficient evidence to justify making an adverse finding.⁵⁰ This

reform model ... limits the risk of unnecessary damage to reputation, preserves the Commission’s role in publicly exposing corrupt conduct and emphasises the need for the strategic use of other investigative strategies and methodologies in the confidential investigation stage.⁵¹

16.48 This is similar to the model used in the Royal Commission on the Activities of the Federated Ship Painters and Dockers Union (1984), where matters were usually

44 Ibid, Rec 27. This is now Inquiries Bill 2008 (NZ) cl 15(1).

45 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Rec 28. This is now Inquiries Bill 2008 (NZ) cl 15(2).

46 *Independent Commission Against Corruption Act 1988* (NSW) s 31, as originally enacted.

47 Peter McClellan QC, ‘ICAC: A barrister’s perspective’ (1991) 2(3) *Current Issues in Criminal Justice* 17.

48 *Independent Commission Against Corruption (Amendment) Act 1991* (NSW) sch 1, cl 2. In 2005, public hearings of ICAC were renamed ‘public inquiries’ and private hearings renamed ‘compulsory examinations’: *Independent Commission Against Corruption Amendment Act 2005* (NSW) sch 1, cl 17.

49 See P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), Ch 4, Pt 4.

50 Parliament of New South Wales—Joint Committee on the Independent Commission Against Corruption, *Review of the ICAC Stage III: The Conduct of ICAC Hearings* (2002), 44.

51 P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), [4.220].

explored in private sittings to ensure that ‘before matters were put in a public sitting there was a high degree of confidence that they would be material to [the Royal Commissioner’s] enquiries and the expected answers would be likely to be correct’.⁵²

Power to restrict publication

16.49 Section 6D(3) of the *Royal Commissions Act* enables a Royal Commission to make a direction prohibiting or restricting publication of evidence, the contents of any document or description of a thing produced or delivered to it, or any information that might enable a person who has given evidence before the Commission to be identified. The section does not set out any limitations on this power, or indicate the grounds on which such a power may be exercised.⁵³ Similar provisions can be found in the inquiries legislation of other jurisdictions.⁵⁴

16.50 In the HIH Royal Commission, Commissioner Owen indicated that the exercise of the discretion to make an order should be guided by the principles used by courts.⁵⁵ The powers of courts to restrict publication in a similar manner, through what are commonly known as suppression orders, have been reviewed recently by the New South Wales Law Reform Commission (NSWLRC).⁵⁶ The NZLC is also examining suppression orders.⁵⁷ The ALRC considered suppression orders in its 1987 report, *Contempt* (ALRC 35).⁵⁸

16.51 Suppression orders in courts are underpinned by a number of important considerations, including the principle that ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done’⁵⁹ (the principle of open justice), and freedom of expression.⁶⁰ The principle of open justice, however, may be in tension with the greater purpose of ensuring that justice is done.⁶¹ For example, it may be necessary to make a suppression order to ensure that juries are not unduly influenced.

16.52 The powers of courts to make suppression orders derive from the common law and a variety of statutory provisions.⁶² At common law, the principle of open justice

52 F Costigan, *Final Report of the Royal Commission on the Activities of the Federated Ship Painters and Dockers Union* (1984), vol 2, [14.040].

53 A contravention of such a direction is a criminal offence: *Royal Commissions Act 1902* (Cth) s 6D(4). This is discussed in Ch 19.

54 *Special Commissions of Inquiry Act 1983* (NSW) s 8; *Evidence Act 1958* (Vic) s 19B; *Commissions of Inquiry Act 1950* (Qld) ss 16; *Royal Commissions Act 1917* (SA) s 16A; *Royal Commissions Act 1968* (WA) s 19B; *Commissions of Inquiry Act 1995* (Tas) ss 13, 14; *Royal Commissions Act 1991* (ACT) s 28; *Inquiries Act 1991* (ACT) s 21.

55 N Owen, *HIH Royal Commission: Reasons for Ruling No 04/02* (2002).

56 New South Wales Law Reform Commission, *Contempt by Publication*, Report 100 (2003).

57 New Zealand Law Commission, *Suppressing Names and Evidence*, IP 13 (2008).

58 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), Ch 6.

59 *R v Sussex JJ ex p McCarthy* [1924] 1 KB 256, 259.

60 New Zealand Law Commission, *Suppressing Names and Evidence*, IP 13 (2008), [1.1].

61 *Ibid*, [1.5].

62 See generally A Kenyon, ‘Not Seeing Justice Done: Suppression Orders in Australian Law and Practice’ (2006) 27 *Adelaide Law Review* 279.

cannot be departed from unless it is necessary in the administration of justice.⁶³ There are established categories in which suppression orders may be made at common law, including to protect trade secrets and other confidential information.⁶⁴

16.53 Some of the statutory provisions governing the making of suppression orders by courts set out the grounds for making those orders.⁶⁵ The grounds typically relate to: the interests of justice, including prejudice to a fair trial; the interests of victims or witnesses, including the safety of persons and the adverse impact on victims of sexual offences; national security or defence; and public morality or decency.⁶⁶

Submissions and consultations

16.54 Stakeholders in this Inquiry generally agreed that the public interest in open hearings and publication of evidence had to be weighed against other considerations, and that the balance to be struck would vary from inquiry to inquiry. Opinions differed, however, on the desirability of public access and, in particular, when the balance between competing considerations would favour a restriction on access to a hearing or a restriction on publication—with the exception of certain clear cases such as information that would prejudice national security.

16.55 In response to the ALRC’s Issues Paper, *Review of the Royal Commissions Act* (IP 35), most stakeholders who made submissions supported the principle that, in general, public inquiries should be open, and that the power to take evidence in private, while necessary, was an exception to that general rule. For example, Liberty Victoria submitted that:

In general, Liberty believes all public inquiries should be open, but recognises that this must be weighed against the protection of individual liberties.⁶⁷

16.56 The CPSU submitted that ‘public accountability and transparency must be paramount in all forms of public inquiries’, and expressed concern that the credibility of inquiries conducted mostly in private ‘is often compromised, fairly or unfairly, by the way in which it was conducted’.⁶⁸ The CPSU noted that, in some circumstances, it would be appropriate for evidence to be taken in private, such as where evidence might otherwise fall within the scope of secrecy provisions. The opportunity for evidence to

63 *Scott v Scott* [1913] AC 417.

64 See, eg, *David Syme & Co Ltd v General Motors-Holden’s Ltd* [1984] 2 NSWLR 294. See generally A Kenyon, ‘Not Seeing Justice Done: Suppression Orders in Australian Law and Practice’ (2006) 27 *Adelaide Law Review* 279, 284–286.

65 See, eg, *Supreme Court Act 1986* (Vic) ss 18, 19.

66 See A Kenyon, ‘Not Seeing Justice Done: Suppression Orders in Australian Law and Practice’ (2006) 27 *Adelaide Law Review* 279; New Zealand Law Commission, *Suppressing Names and Evidence*, IP 13 (2008), Ch 2. In November 2008, the Standing Committee of Attorneys-General agreed to develop draft model provisions to enable harmonised legislation governing suppression orders, and also agreed to further development of a national electronic register of such orders: Standing Committee of Attorneys-General, *Communiqué*, November 2008, [16].

67 Liberty Victoria, *Submission RC 1*, 6 May 2009.

68 Community and Public Sector Union, *Submission RC 10*, 22 May 2009.

be taken in private may influence the level of information willingly provided by the witness.⁶⁹ The CPSU concluded:

It should therefore be open to a Commissioner to accept evidence in private, however in deciding whether to accept evidence in private the Commissioner should be required by the statute to balance the interests of claims to privacy with the interests of the public in having an open, public inquiry.

The CPSU believes that it is important that Royal Commissions and public inquiries should have public hearings and their reports clearly identify the evidence on which findings are made. Any evidence taken in private should only be by necessity and should be the exception to the rule. The only exemptions should be where a party has a legitimate interest in maintaining privacy and, on balance, that legitimate individual interest overrides the public interest in such matters being dealt with openly. Wherever possible, the Commissioner should merely de-identify such evidence in its report.⁷⁰

16.57 Civil Liberties Australia similarly commented that:

For the people to have confidence in the system, the process must be public, the findings must be publicised and the recommendations acted on (or good reasons for not doing so explained in full).⁷¹

16.58 Civil Liberties Australia also acknowledged that ‘there may be situations, such as compelling disclosure by journalists, clerics (and other groups in exceptional circumstances)’ where private hearings and non-publication orders would be appropriate. In its view, however, it was appropriate to restrict media coverage in certain ways, such as restrictions on filming and photographing people arriving and departing from inquiries, limiting the reporting of such inquiries; revocation of permission to continue coverage of an inquiry; and requirements to pay fines for acting in breach of inquiries.⁷²

16.59 Mr Don McKenzie also argued strongly for public hearings in the context of corruption, noting a number of benefits, the most important being

that the community will know that if the integrity of government is called into question, this will be resolved in public, in a manner that it can observe, and which precludes manipulation by powerful or well connected people.⁷³

16.60 In McKenzie’s view, concerns about the trauma that can be experienced by people called before a public inquiry ‘is a reason to manage the process in a more effective manner, to better guard against unfair treatment, rather than to discard the approach altogether’.⁷⁴

69 Ibid.

70 Ibid.

71 Civil Liberties Australia, *Submission RC 17*, 19 May 2009.

72 Ibid.

73 D McKenzie, *Submission RC 27*, 28 September 2009.

74 Ibid.

16.61 The Department of Immigration and Citizenship (DIAC) submitted that a legislative presumption that an inquiry should hold a hearing in public would be useful. Such a provision, however, should allow an inquiry to exclude the public from a hearing (or from part of it) where an inquiry decides that the public interest in holding the hearing in public is outweighed by other considerations. These other considerations could include the consequences of possible disclosure of national security information, the right to privacy, and the right of any person to a subsequent fair trial. DIAC also noted that sensitive documents, such as documents that could prejudice national security, should not be set out in detail in an inquiry's report.⁷⁵

16.62 DIAC considered that it may be useful to allow certain witnesses to give evidence in private to avoid media scrutiny or public attention—in particular witnesses of 'a junior level [who] have only had limited involvement in, or responsibility for, the issue being investigated by the inquiry'.⁷⁶

16.63 The Law Council of Australia (Law Council) submitted that any new legislation should include, among other things, criteria to determine whether certain information should be prevented from public disclosure or publication. Such criteria could require inquiry members to consider issues such as personal privacy, national security and the public interest in publication before determining whether to conduct hearings in private or restrict publication of certain material.⁷⁷

16.64 The Inspector-General of Intelligence and Security (IGIS) submitted:

I would observe that the degree of openness with which an inquiry can be conducted will be determined by the subject matter and consideration of sensitivities such as privacy and security. In the case of the IGIS Act, inquiries must be conducted in private ... This is hardly surprising given the nature of the material which will be involved. The experience of other inquiries and Royal Commissions which have dealt with intelligence and security issues has been that most of the proceedings must be conducted in private.⁷⁸

16.65 The Commonwealth Ombudsman noted that his investigations were conducted in private, and that reports of the investigations usually did not include identifying details. The Ombudsman suggested this approach could be adopted where there was an inquiry into events relating to identifiable individuals, especially if they related to sensitive personal information, or where an inquiry dealt with an inherently sensitive matter. The Ombudsman noted that, 'while the default position might lean towards openness, inquiries need to be given some legislative guidance about the circumstances that may warrant such a departure'.⁷⁹

75 Department of Immigration and Citizenship, *Submission RC 11*, 20 May 2009.

76 *Ibid.*

77 Law Council of Australia, *Submission RC 9*, 19 May 2009.

78 Inspector-General of Intelligence and Security, *Submission RC 2*, 12 May 2009.

79 Commonwealth Ombudsman, *Submission RC 13*, 4 June 2009.

16.66 The Australian Government Solicitor (AGS) noted that it was rare for a Royal Commission to take evidence in private, but that ‘the power to take evidence in private remains an important option and we see no reason why that power should not be maintained’.⁸⁰ The AGS submitted that it was ‘not aware of compelling arguments in favour of a legislative *requirement* that Royal Commissions and other public inquiries should hold hearings in public’.⁸¹ Private hearings might be necessary to protect, for example, national security information, the identity of certain witnesses or to prevent the disclosure of matters which could interfere with the administration of justice. The AGS considered that inquiries should maintain a broad discretion to conduct their proceedings as they consider appropriate, and noted that administrative mechanisms such as publishing edited or redacted forms of evidence, or summaries of evidence, might be adopted if evidence was given in private.

16.67 Dr Ian Turnbull submitted:

A public inquiry does not require public hearings. Transcripts can be made available on the internet, for example. The key to its public nature is that the final report be complete and thorough and contain or refer to all relevant evidence (with identified exemptions).⁸²

16.68 Most stakeholders who addressed this issue in consultations expressed significant concern about the prejudice caused to reputations by public hearings, particularly where witnesses were subsequently cleared or were not the subject of an inquiry. These stakeholders also emphasised the fact that there was already strong pressure, particularly by the media, to hold inquiries in public, and expressed concern that not enough attention was paid to the legitimate interests of individuals that might outweigh the public interest in an open inquiry.

16.69 Some stakeholders also indicated that inquiries held in private were a much more efficient way to get to the truth. Such inquiries were said to enable a degree of informality that was more productive, minimised the need for legal representation and greatly enhanced the flexibility of an inquiry. Stakeholders echoed the concern of the NZLC that including a statutory requirement that hearings normally be held in public would lead to an undesirable degree of formality in inquiry processes.

16.70 While stakeholders generally agreed that the control of proceedings should be left to the head of the inquiry, there was support for additional guidance on these matters. Stakeholders differed, however, on the form such guidance should take. Some were of the view that codifying exemptions in legislation would be too restrictive, although there was support by some stakeholders for a non-exhaustive list of circumstances in which it was appropriate to restrict public access.

80 Australian Government Solicitor, *Submission RC 15*, 18 June 2009.

81 *Ibid.*

82 I Turnbull, *Submission RC 6*, 16 May 2009.

16.71 In the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), the ALRC proposed that Royal Commissions and Official Inquiries should continue to have a general power to prohibit or restrict public access to hearings, publication of information identifying a person giving information to an inquiry, or information provided to an inquiry. The ALRC also proposed that this power could be exercised on a number of specified grounds, including ‘any other matter that an inquiry considers appropriate’.⁸³

16.72 The Law Council was the only stakeholder to address this proposal in its submission. It supported the proposal, although noting that the proposed grounds were broader than those suggested by it in its earlier submission. The Law Council reiterated its view that, while inquiries ‘should be as open and accessible to the public as possible and make their reports public to the greatest extent possible’, there would be ‘circumstances ... in which members of an inquiry may see the need to restrict access to an inquiry and parts of a report’.⁸⁴ It emphasised that members of inquiries, not government agencies, should make such determinations.

ALRC’s view

16.73 The power to conduct an inquiry in private or restrict publication of material protects a range of interests, such as the reputations of those participating in inquiries and the sensitivity of information. This power is especially significant given that certain material that is protected from disclosure to a court may have to be disclosed to a Royal Commission or Official Inquiry.⁸⁵

16.74 The ALRC recommends that Royal Commissions and Official Inquiries be empowered to make directions prohibiting or restricting:

- public access to a hearing;
- prohibiting or restricting publication of any information that might enable a person to identify a person giving information to an inquiry; or
- publication of any information provided to an inquiry.

16.75 This power should be formulated to ensure that it extends beyond witnesses giving evidence at a hearing to include less formal types of information-gathering processes.

83 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 15–4.

84 Law Council of Australia, *Submission RC 30*, 2 October 2009.

85 See Chs 17, 18. For example, a Royal Commission may compel the production of information that would, in a court, be protected from disclosure by the privilege against self-incrimination, or which would be inadmissible in a court because it was hearsay or opinion evidence.

16.76 In the ALRC's view, the discretion to exercise the power should not be constrained by a legislative requirement that, in general, inquiries should hold hearings in public. The pressure to hold inquiries in public is already great, and a legislative presumption might tilt the balance too heavily in favour of public access.

16.77 There are three reasons why there may be a greater need to restrict public access in an inquiry than in a court proceeding. First, while the holding of public hearings may instil confidence in the integrity of the inquiry's processes, inquiries are not concerned with ensuring the integrity of the judicial process. In this respect, the public interest in public hearings of an inquiry is less compelling than the public interest in open court hearings.

16.78 Secondly, the wider range of information that is typically accessed by an inquiry, the wider scope of its inquiry, and the fewer evidential and procedural safeguards that apply to disclosure may mean that greater restrictions on disclosure may be appropriate. For example, where Royal Commissions and Official Inquiries obtain information that could not be obtained in a court—such as by compelling the production of incriminating evidence—it may be appropriate to restrict publication of such evidence.⁸⁶ Further, as noted earlier, it may be appropriate to restrict publication of findings bearing on breaches of the criminal law.

16.79 Thirdly, inquiries differ from courts in that inquiries are investigatory. Publication of material during the progress of an investigation may prejudice the success of the investigation. For example, publishing the evidence of a witness may alert other potential witnesses to the direction the inquiry is taking. Publication of material during an investigation also may lead to unfair damage, because suspicions raised during the course of an inquiry may, in the light of all of the evidence, turn out to be unfounded. Some inquiries may be more efficiently and effectively conducted in private, or partly in private. Many non-statutory inquiries are now currently conducted largely or entirely in private, as are statutory investigations such as those by the Commonwealth Ombudsman. A requirement that hearings should be held in public is likely to encourage greater formality in these types of inquiries, which involves additional time and cost.

16.80 Given the importance of the discretion to restrict public access, however, there is significant value in giving greater guidance as to its use. The ALRC recommends that a non-exhaustive list of the grounds which might justify a prohibition or restriction on public access, or publication, should be set out in the statute. It is not necessary to provide further that an inquiry should balance these interests against the public interest in an open inquiry. In the ALRC's view, such a requirement might have the same effect as a legislative requirement that an inquiry should generally be held in public: namely, it might further tilt the balance in favour of an open inquiry, at the expense of legitimate interests that may need protection.

86 See Ch 17.

16.81 There are a number of factors which are readily identifiable as reasons why a restriction on access might be desirable, whether in the form of restricting public access to a hearing or restricting publication. These include the prejudice or hardship caused to an individual; the nature and subject-matter of the information that may be involved; the potential for prejudice to legal proceedings; and the efficient and effective conduct of an inquiry. This list should not be exhaustive, however, as it is difficult to foresee all the circumstances that might justify restrictions on public access.⁸⁷

16.82 Consequently, there is no need for an equivalent of s 6D(2) of the *Royal Commissions Act*, enabling a person to request a private hearing in the case of prejudice to the financial position or profits of a person.

16.83 In Chapter 15, the ALRC recommends that the *Inquiries Handbook* should address matters of procedure.⁸⁸ It may be useful for one of these matters to be the circumstances in which it might be appropriate to prohibit or restrict access or publication, and the competing interests in using public or private hearings.⁸⁹

Recommendation 16–1 The recommended *Inquiries Act* should provide that members of Royal Commissions and Official Inquiries may:

- (a) make directions prohibiting or restricting:
 - (i) public access to a hearing;
 - (ii) publication of any information that might enable a person to identify a person giving information to the inquiry; and
 - (iii) publication of any information provided to the inquiry; and
- (b) exercise the power to prohibit or restrict public access or publication on the following grounds:
 - (i) prejudice or hardship to an individual;
 - (ii) the nature and subject matter of the information that may be involved;

87 These factors are framed more broadly than statutory provisions empowering courts to make suppression orders, and the equivalent provision in the *Inquiries Bill 2008* (NZ). They capture a broader range of interests that might need to be protected, and take into account the fact that there may be a greater need to restrict public access in the context of inquiries.

88 Recommendation 15–5.

89 Similar advice is given, for example, by the Council on Tribunals: Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [7.4]–[7.7].

- (iii) the potential for prejudice to legal proceedings;
- (iv) the efficient and effective conduct of an inquiry; and
- (v) any other matter that an inquiry considers appropriate.

Inquiries affecting Indigenous peoples

16.84 There have been a number of public inquiries that have affected Indigenous peoples, although the last federal Royal Commission focusing primarily on Indigenous issues was the Royal Commission into Aboriginal Deaths in Custody (1991).⁹⁰ The treatment of Indigenous witnesses in public inquiries was raised as an issue in consultations. Some of these concerns also may be applicable to other minority groups.

16.85 The issues that Indigenous witnesses may encounter in giving evidence in court have been addressed in a number of reports by the ALRC and other law reform bodies.⁹¹ These issues include language and physical communication barriers; cultural factors that influence communication; the formality of court proceedings; and the effect of customary laws on the giving of evidence.⁹² There are many Indigenous groups in Australia and the ALRC notes that the observations below are general in nature and may not apply equally to all Indigenous peoples.

Language and physical communication barriers

16.86 Many Indigenous peoples speak a number of languages other than Standard Australian English,⁹³ including traditional languages, pidgins or creoles, and Aboriginal English.⁹⁴ In the 2006 census, 12% of Indigenous people spoke an

90 Other public inquiries include the federal Northern Territory Emergency Response Review Board (2008); Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007), established under the *Inquiries Act 1945* (NT); Commission of Inquiry: Children on APY Lands (2007), established under the *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA); and the Hindmarsh Island Bridge Royal Commission (1995), established under the *Royal Commissions Act 1917* (SA).

91 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), vol 1, pt V; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000); Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), Ch 5. See also Criminal Justice Commission (Qld), *Aboriginal Witnesses in Queensland's Criminal Courts* (1996); New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, NSWLRC 96 (2000), Ch 7.

92 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), Ch 15.

93 Standard Australian English is a linguistic term which refers to 'the form of Australian English which conforms to the perceived notion of appropriate usages for serious writing': *Macquarie Dictionary* (3rd revised ed, 2001).

94 Criminal Justice Commission (Qld), *Aboriginal Witnesses in Queensland's Criminal Courts* (1996), 15–17.

Indigenous language at home, and 19% indicated they did not speak English well or at all.⁹⁵ Aboriginal English is a dialect of Australian English and is the first language for many Indigenous people in Queensland. It differs from Standard Australian English in pronunciation, grammar, vocabulary and style.⁹⁶

16.87 As a result, some Indigenous witnesses, while speaking some English, may not be fluent in Standard Australian English and may encounter difficulties in legal proceedings. They may not fully understand the questions put to them, and their responses may be misinterpreted because of the different meanings of common English words in Aboriginal English or in one of the creoles.⁹⁷ A range of Indigenous interpreting services have been established to address these difficulties, most notably the Northern Territory Aboriginal Interpreters Service.

16.88 The need for skilled interpreters for Indigenous peoples in Australia has been noted many times before in previous reports, including by the ALRC.⁹⁸ Access to interpreters is also included in art 13 of the *United Nations Declaration on the Rights of Indigenous Peoples*, which provides:

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.⁹⁹

16.89 A statutory right to an interpreter has been recommended in a number of reports. For example, the Queensland Criminal Justice Commission (QCJC) recommended that the *Evidence Act 1977 (Qld)* should include a provision that a ‘witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to

95 Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2006*, 4713.0 (2008).

96 Criminal Justice Commission (Qld), *Aboriginal Witnesses in Queensland’s Criminal Courts* (1996), 16–17.

97 Ibid, 17–18. In addition, the high incidence of hearing impairment in Indigenous groups may be a physical barrier to communication: Criminal Justice Commission (Qld), *Aboriginal Witnesses in Queensland’s Criminal Courts* (1996), 28–29.

98 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), [600]; Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC 57 (1992), Ch 3. See also E Johnston, *Royal Commission into Aboriginal Deaths in Custody* (1991), Recs 99, 100, 249; Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007), Rec 34; National Human Rights Consultation, *Report* (2009), Ch 9.

99 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/47/1 (2007), art 13. The Australian Government has issued a formal statement in support of this declaration: see Jenny Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), ‘Statement in Support of the UN Declaration on the Rights of Indigenous Peoples’ (Speech, 3 April 2009).

make an adequate reply to, questions that may be put about the fact'.¹⁰⁰ The QCJC further recommended that, if a court had any reason to doubt the capacity of a witness both to understand and speak Standard Australian English, proceedings should not continue until an interpreter is provided.¹⁰¹

16.90 The uniform evidence laws in place in several Australian jurisdictions permit a witness to give evidence 'about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact'.¹⁰² This applies to court proceedings and other proceedings that apply the rules of evidence.¹⁰³ This provision was based on a recommendation made by the ALRC in its 1985 Interim Report on *Evidence* (ALRC 26).¹⁰⁴

16.91 In some non-judicial proceedings, such as those before the Migration Review Tribunal, a person is entitled to an interpreter if the person is not sufficiently proficient in English. Section 366C of the *Migration Act 1958* (Cth) provides:

- (1) A person appearing before the Tribunal to give evidence may request the Tribunal to appoint an interpreter for the purposes of communication between the Tribunal and the person.
- (2) The Tribunal must comply with a request made by a person under subsection (1) unless it considers that the person is sufficiently proficient in English.
- (3) If the Tribunal considers that a person appearing before it to give evidence is not sufficiently proficient in English, the Tribunal must appoint an interpreter for the purposes of communication between the Tribunal and the person, even though the person has not made a request under subsection (1).

16.92 This statutory obligation does not require that the interpreter be accredited, although the interpreter must be competent.¹⁰⁵ The lack of accredited or professionally trained interpreters is another issue that was raised in consultations. This is a longstanding difficulty which persists, despite the establishment of some Indigenous interpretation services—as was recently recognised in the report of the National Human Rights Consultation (2009).¹⁰⁶

100 Criminal Justice Commission (Qld), *Aboriginal Witnesses in Queensland's Criminal Courts* (1996), Rec 5.1.

101 *Ibid*, Rec 5.2.

102 *Evidence Act 1995* (Cth) s 30.

103 Other legislation makes similar provision: see, eg, *Crimes Act 1958* (Vic) s 464D; *Evidence Act 1971* (ACT) s 63A.

104 Australian Law Reform Commission, *Evidence (Interim)* ALRC 26 (1985), [611]. See generally Australian Law Reform Commission, *Multiculturalism and the Law* ALRC 57 (1992), Ch 2.

105 *Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6, [31].

106 National Human Rights Consultation, *Report* (2009), Ch 9.

16.93 As the ALRC has noted previously, the quality of an interpreter is critical, especially in legal proceedings, and therefore professional interpreters are generally desirable.¹⁰⁷ On the other hand,

limiting the use of interpreters to professional interpreters limits access to interpreters. Unlike friends or relatives, professional interpreters have to be paid. There may not be a professional accredited interpreter available for the witness' language, especially for new or very small migrant groups. If so, any reasonably able interpreter would be better than no interpreter at all. A professional interpreter may not be necessary in all cases. Some people may feel more comfortable using a friend or relative rather than a professional interpreter who is not known to them.¹⁰⁸

Communication styles

16.94 A number of cultural factors may affect the way Indigenous peoples communicate in formal proceedings. For example, interviews conducted through questions and answers are said to be 'culturally alien to many Aboriginal people, who are accustomed to a less direct form of information gathering'.¹⁰⁹ Indigenous groups may build up complex information over a period of time, and through a series of interactions. The appropriate response, if one does not understand, may be to wait for clarification through continued interaction, as to 'state that one does not understand what has been said can be humiliating'.¹¹⁰ If an Indigenous person volunteers information about a matter, it can be intensely embarrassing for him or her to have that knowledge questioned.¹¹¹

16.95 Indigenous peoples may seek to avoid open disagreement or criticism. Avoiding loss of personal dignity is central in dealing with conflict, and a key strategy to achieve this is to feign disinterest.¹¹² Indigenous witnesses are also susceptible to agreeing to a question rather than disagreeing, particularly if the questioning takes place in an oppressive environment and over a long period of time.¹¹³

16.96 Another feature of Indigenous communication styles is that silence may indicate a number of different things. For many Indigenous groups, silence is a common and positively valued part of conversation that allows time for thinking. In a courtroom, however, it may imply that the person is not in control of, or not comfortable with, the dialogue. It may also indicate a lack of authority to speak about a matter, or criticism or disapproval if there is conflict within an Indigenous group. Further, silence may indicate a failure of the person questioning to understand matters important to the Indigenous person.¹¹⁴

107 Australian Law Reform Commission, *Multiculturalism and the Law* ALRC 57 (1992), [3.21].

108 *Ibid.*

109 Criminal Justice Commission (Qld), *Aboriginal Witnesses in Queensland's Criminal Courts* (1996), 19.

110 *Ibid.*

111 *Ibid.*, 19–20.

112 *Ibid.*, 20.

113 *Ibid.*, 21–22.

114 *Ibid.*, 23–24.

Formality of proceedings

16.97 The QCJC reported that many of the people it had consulted for its report on *Aboriginal Witnesses in Queensland's Criminal Courts* indicated that

feelings of intimidation, isolation, fear and disorientation are common among Aboriginal people who gave evidence in our courts. Those feelings are not restricted to Aboriginal people, nor are they experienced by all Aboriginal people. However, the [QCJC] is satisfied that feelings of alienation are sufficiently widespread among Aboriginal people to justify measures to make courts more familiar and less intimidating.¹¹⁵

Effect of customary laws

16.98 The customary laws of Indigenous groups also may affect the ways in which Indigenous participants in an inquiry provide information.¹¹⁶ An Indigenous person may not have the authority to speak on certain matters—for example, issues related to specific areas of land—or may have the authority to speak only in conjunction with others who collectively have such authority. Some information may be secret, and an Indigenous person may be subject to severe penalties for breaching that secret. In addition, it needs to be considered whether an Indigenous person should be required to disclose information that may violate customary law, particularly if such disclosure might expose them to some retaliation.¹¹⁷

Similar measures

16.99 A number of measures have been developed to address these issues in relation to courts, and in particular in relation to native title proceedings as well as inquiries such as the Royal Commission into British Nuclear Tests in Australia (1985). For example, the *Evidence Act 1995* (Cth) allows a court to direct that evidence can be given in narrative form.¹¹⁸ The QCJC recommended that a similar provision be included in the *Evidence Act 1977* (Qld).¹¹⁹

16.100 The Supreme Court of the Northern Territory has developed guidelines to apply to the interrogation of Indigenous peoples by police, known as the Anunga Rules.¹²⁰ These address matters such as the need for interpreters and legal assistance, the desirability of a 'prisoner's friend' or support person being present, the need to ensure that the person understands the meaning of the right to silence, and the need to frame questions carefully and avoid cross-examination. If the Rules have been seriously breached, any confession is likely to be rejected at a trial. These guidelines

115 Ibid, 77.

116 These issues are discussed in Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), vol 1, Ch 25.

117 This may raise similar concerns to those which justify the privilege against self-incrimination. See Ch 17.

118 *Evidence Act 1995* (Cth) s 29(2).

119 Criminal Justice Commission (Qld), *Aboriginal Witnesses in Queensland's Criminal Courts* (1996), Rec 4.1. It recommended, however, that there should be no requirement that the court must make a direction to this effect.

120 *R v Anunga* (1976) 11 ALR 412.

have been incorporated into standing police orders and are applied in other jurisdictions, although care clearly needs to be taken to ensure their appropriateness in the particular circumstances.¹²¹

Submissions and consultations

Duty to consult

16.101 In DP 75, the ALRC proposed that, if the inquiry concerned matters that may have a significant effect on Indigenous peoples, there should be a legislative duty to consult with Indigenous groups, individuals or organisations to inform the development of appropriate procedures for the conduct of a Royal Commission or Official Inquiry.¹²²

16.102 This proposal was partly based on stakeholder concerns that guidelines and protocols were not always applied in practice.¹²³ Other stakeholders felt it would be difficult to frame a specific provision given the diversity of Indigenous groups and the diversity of circumstances in which inquiries might arise.

16.103 Stakeholders had also indicated support for a range of more detailed procedural matters, such as the right to bring a support person to an inquiry; the desirability of allowing narrative evidence and group evidence; the desirability of restricting unnecessary cross-examination; and the need to ensure that hearings are located near communities and in relatively informal settings. Finally, some stakeholders thought guidance was desirable in relation to types of culturally sensitive evidence that might require protection, including whether such evidence ought to be heard in private.

16.104 The few stakeholders who addressed this issue after the release of DP 75 generally expressed support for this proposal.¹²⁴ The Law Council supported the proposal, noting however that greater guidance should be given about when an inquiry will have a ‘significant effect’ on Indigenous peoples.¹²⁵ The Australian Collaboration also considered that these procedures should be addressed in some detail in the

121 Ibid. These rules, or similar rules, have been incorporated into police orders or otherwise apply as relevant guidelines in the Northern Territory, Queensland, South Australia, and Western Australia: see, eg, *R v LLH* (2002) 132 A Crim R 498; *Webb v The Queen* (1994) 13 WAR 257, 259; *R v W* [1988] 2 Qd R 308; *Walker v Marklew* (1976) 14 SASR 463 (FC). See also D Mildren, ‘Redressing the Imbalance: Aboriginal People in the Criminal Justice System’ (1999) 6 *Forensic Linguistics* 1350; M Powell, ‘Practical Guidelines for Conducting Investigative Interviews with Aboriginal People’ (2000) 12 *Current Issues in Criminal Justice* 181.

122 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 15–6.

123 This concern was acknowledged in the context of privacy protocols in Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108 (2008), Ch 7.

124 Australian Collaboration, *Submission RC 24*, 22 September 2009; Community and Public Sector Union, *Submission RC 25*, 22 September 2009.

125 Law Council of Australia, *Submission RC 30*, 2 October 2009.

Inquiries Handbook.¹²⁶ Turnbull, while not disagreeing with the proposal, considered a better approach would be to frame the proposal more broadly to require inquiries to consider other ethnic, religious and other sensitivities or customary laws in appropriate circumstances, and specifically identifying Indigenous groups among those.¹²⁷

Interpreters

16.105 In DP 75, the ALRC also proposed that an interpreter should be appointed if a person is asked to provide information to a Royal Commission or Official Inquiry and the person is not sufficiently proficient in English.¹²⁸ Stakeholders in consultations emphasised the importance of interpreters, and there was support for a statutory right to an interpreter, particularly since such a right could have implications in terms of funding. As noted above, they observed that one of the difficulties was the lack of access to accredited interpreters, or interpreters of good quality.

16.106 All of the stakeholders who addressed this issue in submissions supported this proposal.¹²⁹ The Law Council was concerned, however, that the proposal as framed did not clearly require an inquiry to appoint an interpreter upon the request of a person asked to provide information to an inquiry.¹³⁰

ALRC's view

Consultation

16.107 In order to ensure that the special needs of Indigenous peoples participating in an inquiry are addressed adequately, the ALRC recommends that a Royal Commission or Official Inquiry inquiring into matters that may have a significant effect on Indigenous peoples should be required to consult with Indigenous groups, individuals and organisations to inform the development of procedures for an inquiry. In the ALRC's view, such consultation is necessary to ensure the effectiveness and the legitimacy of a public inquiry significantly affecting Indigenous peoples.

16.108 This duty to consult would arise only where the inquiry was likely to have a significant effect on Indigenous peoples. For example, it would arise if an inquiry focused upon Indigenous rights or interests, such as native title, or focused upon the effect of particular social issues upon Indigenous groups—the Royal Commission into Aboriginal Deaths in Custody being an example. The duty would not arise, however, merely because an Indigenous person was called to give evidence in an inquiry which otherwise had no special bearing on Indigenous interests.

126 Australian Collaboration, *Submission RC 24*, 22 September 2009.

127 I Turnbull, *Submission RC 22*, 21 September 2009.

128 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 15–7.

129 Liberty Victoria, *Submission RC 26*, 27 September 2009; Australian Collaboration, *Submission RC 24*, 22 September 2009; I Turnbull, *Submission RC 22*, 21 September 2009.

130 Law Council of Australia, *Submission RC 30*, 2 October 2009.

16.109 This broad duty to consult takes into account the concern expressed by stakeholders that the appropriate procedures in a particular inquiry will depend on the groups affected by the inquiry as well as the nature of the inquiry. It would be inappropriate to develop a generalised set of guidelines about the treatment of Indigenous participants because of the diversity of Indigenous groups and interests within those groups, and the diversity of the types of issues and procedures that may arise in a particular inquiry. Another reason for imposing a legislative requirement is the view of some stakeholders that guidelines and protocols have not generally proven effective.

16.110 The legislative duty to consult, it should be noted, is not a duty to ensure a particular outcome. It is a duty to consult a particular group that is significantly affected to inform the development of procedures. It does not specify the level or type of consultation that is required—as noted above, this will depend on the particular inquiry and the Indigenous peoples that are likely to be affected. Nor does it require specific procedures to be adopted.

16.111 It is important for the legitimacy and fairness of any inquiry that the specific needs of any particular group should be considered in the development of the procedures of an inquiry, so it will be appropriate for inquiries to consider the need for consultation in relation to other specific groups, such as religious or ethnic communities, if those specific groups are specially affected by an inquiry.

16.112 The ALRC does not, however, recommend that the legislative duty to consult should be imposed in relation to other groups. As the ALRC has noted previously, Indigenous peoples are not in the same position as other cultural groups in Australian society. The historical and political relationship between Indigenous groups and the rest of the Australian community is unique:

This is their country of origin. In relation to the general community, they exist not merely as individuals but as a prior community (or series of communities) inhabiting territory to which the general community itself migrated (without their agreement and without their having any control over that process).¹³¹

16.113 It is the uniqueness of this relationship—which gives special significance to the need for consultation between Indigenous peoples and the rest of the Australian community—that justifies a legislative duty to consult Indigenous peoples in order to inform the development of procedures in an inquiry.

Interpreters

16.114 The ALRC also recommends that there should be a statutory right to an interpreter in inquiries for those who are not sufficiently proficient in English. This

131 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), [164]. See also the preamble to the *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/47/1 (2007).

obligation should be drafted in similar terms to the right to an interpreter before the Migration Review Tribunal—that is, a person may request an interpreter, and must be given one if the inquirer considers he or she is not sufficiently proficient in English. An inquiry must appoint an interpreter, even if the person has not requested one, if an inquiry considers that the person is not sufficiently proficient in English. The language of this provision is preferable to that in the *Evidence Act*, as the latter relates to questioning about specific facts and does not empower a person to request an interpreter. For the sake of clarity, the language of the ALRC’s recommendation has been changed from its original proposal in DP 75 to reflect the language used in the *Migration Act*.¹³²

16.115 As noted above, this recommendation does not require that an *accredited* interpreter should be provided, although it does require a competent interpreter. The lack of adequate access to accredited or professional interpreters makes it impractical to recommend that only professional or accredited interpreters be provided. Further, there may be considerations which weigh against the use of accredited interpreters, such as an Indigenous witness’ preference for an interpreter that he or she knows or that the inquiry trusts, or the desirability of adopting less formal procedures.

16.116 The reason for this recommendation—the obvious desirability that those providing information should understand and be able to communicate effectively—is equally applicable to other groups that may require interpretation services, and the recommendation is therefore not restricted to Indigenous witnesses. It is also framed so that the right to an interpreter exists in more informal types of procedures such as interviews or meetings, as long as the person has been asked to provide information to an inquiry.

Recommendation 16–2 The recommended *Inquiries Act* should provide that, if a Royal Commission or Official Inquiry is inquiring into matters that may have a significant effect on Indigenous peoples, the inquiry should consult with Indigenous groups, individuals or organisations to inform the development of appropriate procedures for the conduct of the inquiry.

Recommendation 16–3 The recommended *Inquiries Act* should provide that, if a person is asked to provide information to a Royal Commission or Official Inquiry, the inquiry must:

- (a) comply with a request for an interpreter unless it considers that the person is sufficiently proficient in English; or

132 *Migration Act 1958* (Cth) s 366C.

- (b) appoint an interpreter if the inquiry considers that the person is not sufficiently proficient in English, even though the person has not requested an interpreter.

Correction of the public record

16.117 Adverse findings can be made in inquiry reports that are not sustained by further investigation. In such a case, the damage done by the adverse finding is generally not countered by a sufficiently prominent correction of the public record.

16.118 The Senate Standing Committee on Education, Employment and Workplace Relations, for example, noted in its report on the Building Royal Commission that ‘allegations, and adverse mentions, and even inferences made about individuals, remain posted on the royal commission website’ although no charges had been brought at this stage.¹³³ The Committee cited with approval a submission that:

to have those allegations remaining unchallenged, unquestioned, untested indefinitely seems to us to be entirely wrong in principle and there should be ... a removal from the public record ... we would share your concern that the person in respect of whom such a finding has been made, remains under that cloud with no opportunity to clear his or her name.¹³⁴

16.119 The Committee recommended that the Senate refer to its Legal and Constitutional Affairs Committee the question of whether amendments should be made to ensure that procedures of royal commissions give due protection to the reputations of people whose prosecutions are recommended but against whom no charges are laid.¹³⁵

16.120 The issue may also arise if an adverse finding is found to be without merit in a subsequent proceeding. This is particularly concerning in relation to administrative and disciplinary proceedings. It may be of less concern in relation to court proceedings, because such proceedings are held in public and tend to be reported by the media if they are related to a public inquiry of significant importance.

16.121 For example, after the Equine Influenza Inquiry reported in April 2008, public statements had been made on behalf of the Department of Agriculture, Fisheries and Forestry, and widely reported, that individual officers named in the report would be investigated for breaches of the Australian Public Service Code of Conduct (APS

133 Senate Employment, Workplace Relations and Education Committee, *Beyond Cole: The Future of the Construction Industry* (2004), [2.28].

134 *Ibid.*, citing the submission of the then Victorian Council for Civil Liberties, now known as Liberty Victoria.

135 *Ibid.*, Rec 3. This recommendation does not appear to have been implemented.

Code of Conduct).¹³⁶ Breaches of the APS Code of Conduct are handled by the employing agency under agency guidelines.¹³⁷ The subsequent investigation found, however, that none of the officers had breached the APS Code of Conduct.¹³⁸ The CPSU observed that ‘the reputations of those individual officers were, however, unfairly harmed by the earlier public comments’.¹³⁹

16.122 The Australian Public Service Commissioner (APSC) provides detailed guidance to agencies about the handling of investigations into breaches of the APS Code of Conduct. This includes advice on when the identity of a person subject to such an investigation should be disclosed.¹⁴⁰ In general, the identity of such an employee is not released unless it is ‘necessary, appropriate and reasonable’ to do so.¹⁴¹ The APSC advises that, before disclosure is made, certain steps should be taken, including notifying the affected person of the usual disclosures that are made,¹⁴² and seeking consent for disclosure of information to third parties, if such information is not normally disclosed to such parties.¹⁴³

16.123 The APSC also publishes advice on the best practice to be adopted by agencies in handling investigations into breaches of the APS Code of Conduct.¹⁴⁴ Its advice is that

it may be appropriate for the agency to take some action, where the employee has suffered any loss of reputation because it became known they were suspected of misconduct if it is clear that no such misconduct occurred (e.g. with the consent of the employee a notice be sent to all relevant employees informing them of the outcome).¹⁴⁵

Submissions and consultations

16.124 In DP 75, the ALRC asked what mechanism, if any, should be included to address the harm caused to a person who, having been named or otherwise being identifiable in a public statement as the subject of an investigation flowing from an inquiry, is cleared in that subsequent investigation, without any further public

136 Although the statement did not include the names of the officers, the identity of the officers could be ascertained readily by examining the report of the Equine Influenza Inquiry.

137 *Public Service Act 1999* (Cth) s 15.

138 At the time of publication of DP 75, this had not been reported. It was subsequently reported in the media in September 2009: Mark Davis, ‘No penalty for officers over equine flu bungle’, *The Age* (Melbourne), 1 September 2009, 3.

139 Community and Public Sector Union, *Submission RC 10*, 22 May 2009.

140 Australian Public Service Commissioner, *Circular No 2008/3: Providing Information on Code of Conduct Investigation Outcomes to Complainants* (2008). This states that ‘withholding a person’s name may not be sufficient to protect that person’s identity. Personal information can include any information or opinion from which a person’s identity is apparent or may be “reasonably ascertained”’: [11].

141 *Ibid.*, [35].

142 *Ibid.*, [16].

143 *Ibid.*, [19]–[21].

144 Australian Public Service Commissioner, *Handling Misconduct: A Human Resources Practitioner’s Guide to the Reporting and Handling of Suspected and Determined Breaches of the APS Code of Conduct* (2007).

145 *Ibid.*

statement to that effect.¹⁴⁶ In DP 75, the ALRC discussed two options for addressing this issue:

- Guidelines or best practice advice could state that the identity of an employee who is subject to an investigation for breach of the APS Code of Conduct should not be disclosed, unless the employee consents. This appears in line with the best practice advice given by the APSC.
- Legislation could require that the results of subsequent investigations relevant to an adverse finding must be published.¹⁴⁷

16.125 Some stakeholders supported the idea of publication of the results of subsequent investigations. For example, Turnbull submitted:

I think that serious damage can flow from such naming and a statement in agreed wording should be published in the media and elsewhere, in a similar way to that which occurs with some defamation claims, indicating that the person was cleared.¹⁴⁸

16.126 The CPSU, elaborating on its earlier submission in response to IP 35, submitted that:

it is generally inappropriate for officials to make public comments announcing that individuals are being investigated for a breach of the Code of Conduct. This view ... is consistent with the advice of the [APSC]. Even if the individuals are not specifically named, it would often be possible to identify them. It is therefore more appropriate that no comment about Code of Conduct or other disciplinary matters be made prior to their completion. Public comments prior to the investigatory process suggest that the matter has been prejudged and deny the employee(s) involved procedural fairness.

Secondly, if such comments are made and the individual is subsequently cleared of any wrongdoing, they should be entitled to have their comments corrected. In the first instance, this could be achieved through the reporting mechanism [recommended in relation to the update of implementations]. It also may be appropriate, if the employee wishes, for a communication to be sent within his/her agency advising other employees of the outcome of the investigation. We note, however, that such corrections are unlikely to achieve the same coverage as comments made in a final report or at the time of release. It is therefore preferable that such comments are not made.¹⁴⁹

16.127 Mr Graham Millar submitted, however, that there was no need to require publication of the results of subsequent investigations, because in an open inquiry most of the tendered evidence is publicly available during the course of an inquiry and subsequently on its website. In his view:

146 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Question 15–2.

147 *Ibid.*, [15.61]–[15.62].

148 I Turnbull, *Submission RC 22*, 21 September 2009.

149 Community and Public Sector Union, *Submission RC 25*, 22 September 2009.

there is arguably a greater opportunity for a person involved in an inquiry to have the evidence presented in support of their case made readily available to the public than might be the case in other legal processes.¹⁵⁰

ALRC's view

16.128 A real issue of fairness arises when adverse findings are made in an inquiry and those adverse findings are not sustained in subsequent proceedings. Such findings may cause irreparable damage to a person's reputation. If a person is subsequently cleared, or if no further investigations are initiated against a person named in a report, fairness to the individual affected requires that these facts should be published.

16.129 This unfairness arises if a person is identified or identifiable as the subject of an adverse finding, even if the person is not identified as the subject of a subsequent investigation. This is because it is the adverse finding itself, rather than the subsequent proceedings taken against a person, which causes damage to a person's reputation. As the APSC advises, however, it is generally inappropriate for the identity of an employee subject to an investigation for breach of the APS Code of Conduct to be released, and steps should be taken to notify the employee and seek their consent for disclosure of information to third parties.

16.130 The ALRC recommends that, in order to remedy this unfairness, the results of proceedings that arise out of an inquiry should be published. Such proceedings may be initiated as a consequence of recommendations made by an inquiry, or on the basis of adverse findings made by an inquiry. Further, if a decision is made not to initiate, or to discontinue, such proceedings, this also should be made public.

16.131 It should be noted that this recommendation requires only the factual reporting of the results of subsequent proceedings. It does not require, and should not be interpreted as requiring, a statement by the government that an inquiry's finding was incorrect. The investigation of an inquiry is different in nature from any subsequent disciplinary, civil or criminal proceedings, and the evidence and results, therefore, may well differ.

Recommendation 16-4 The recommended *Inquiries Act* should provide that the Australian Government make public:

- (a) the results of any disciplinary, civil or criminal proceedings, initiated as a consequence of recommendations or findings of a Royal Commission or Official Inquiry; or
- (b) any decision not to initiate, or to discontinue, such proceedings.